No. 88-256

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

M.M. WINTER,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BURLINGTON NORTHERN RAILROAD COMPANY AND WINONA BRIDGE RAILWAY COMPANY

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QUESTIONS PRESENTED

1. May a court of appeals review agency action when petitions for reconsideration of that action are pending before the agency?

2. Is an agency's acceptance of a facially sufficient exemption notice subject to review by the court of appeals?

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BRIEF IN OPPOSITION OF RESPONDENTS BURLINGTON NORTHERN RAILROAD COMPANY AND WINONA BRIDGE RAILWAY COMPANY

Respondents Burlington Northern Railroad Company ("BN") and Winona Bridge Railway Company ("WB") respectfully request that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINION BELOW

The opinion of the court of appeals is reported at 851 F.2d 1056 and is reprinted in the Appendix to the Petition ("Pet. App.") at pages 1a-18a.

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[1] BN and WB participated in the proceeding below as intervenors in support of respondents the Interstate Commerce Commission ("ICC" or "Commission") and the United States. The listing of their corporate affiliations pursuant to Rule 28.1 is provided as Appendix A to this brief.

STATEMENT OF THE CASE

The petition in this case arises from a pending ICC proceeding regarding a grant of trackage rights to WB by BN, its corporate parent. While pursuing his claims before the Commission, petitioner simultaneously sought to challenge the WB trackage rights in the court of appeals. The court below held it lacked jurisdiction to review the particular ICC order petitioner challenged, in that it was not final agency action subject to appellate review. The lower court thus refused to intercede in the ongoing agency proceeding, leaving to the Commission the initial resolution of petitioner's claims regarding the validity of the WB trackage rights under the Interstate Commerce Act.

This case arose under streamlined procedures established by the ICC for authorizing trackage rights transactions between rail carriers. *See Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 819 F.2d 311 (D.C. Cir. 1987). Under those procedures, carriers that have entered into a written trackage rights agreement may implement the transaction seven days after they file a "notice of exemption" with the ICC. Implementation is subject to mandatory conditions guaranteeing employees of either carrier that are adversely affected by the transaction their full salary and fringe benefits for six years. *See* 49 C.F.R. § 1180.2 (d) (1987).[2] Moreover, the exemption may be revoked by the ICC, in whole or in part, upon a showing that it is contrary to the public interest. *See Railroad Consolidation Procedures*, 1 I.C.C.2d at 280, 281.

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[2] The labor protective conditions imposed on such transactions are those formulated by the Commission in *Norfolk & Western Railway—Trackage Rights—Burlington Northern Railroad*, 345 I.C.C. 605 (1978), *modified sub nom. Mendocino Coast Railway—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

In an effort to attract new traffic to its underutilized line between St. Paul, Minnesota and Seattle, Washington, BN entered into an agreement granting WB the right to carry overhead traffic on that line.[3] WB filed a notice of exemption that became effective on November 25, 1987. Petitioner M.M. Winter and other representatives of BN employees then filed petitions requesting that the Commission reject the notice of exemption as void on its face or, in the alternative, revoke it.[4] The challengers' principal claims were (1) that BN's grant of trackage rights to WB would have a detrimental impact on BN employees; and (2) that the exemption was not applicable because WB was not a "carrier" under the Interstate Commerce Act.

On January 7, 1988, the ICC issued the preliminary decision at issue here. Pet. App. at 20a-29a (the *"January 7 Decision"*). The Commission held that the exemption notice was valid on its face, finding that WB had

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[3] "Overhead traffic" is traffic that moves over a line but neither originates nor terminates on it. Pet. App. at 3a n.4. Under the trackage rights agreement, WB is permitted to pick up and set out traffic moving between BN's intermodal hub centers at St. Paul, Spokane, and Seattle. *Id.* at 3a.

[4] Mr. Winter is the United Transportation Union's General Chairman for BN. The Railway Labor Executives' Association ("RLEA"), which intervened in support of petitioner in the court below, also challenged the WB trackage rights before the agency.

ICC regulations afford protestants several procedural vehicles for after-the-fact challenges to exempted transactions, all of which were pursued here by petitioner and RLEA. In submissions filed December 2, 1987, and November 25, 1987, respectively, petitioner and RLEA sought revocation of the exemption pursuant to 49 U.S.C. § 10505(d). At the same time, they requested that the notice of exemption be rejected as void. *See* Pet. App. at 21a. Subsequently, both petitioner and RLEA sought reopening of the Commission decision at issue here pursuant to 49 U.S.C. § 10327(g), which authorizes parties to seek the parallel remedies of "reopening, rehearing, or reconsideration" of ICC decisions.

been treated as a carrier in prior ICC proceedings and that the existing record would not support a contrary conclusion. *Id.* at 24a. Noting that WB had not yet had an opportunity to respond to petitioner's claims, the agency deferred decision on the requests for revocation of the exemption. *Id.*

Petitioner sought reopening of the *January 7 Decision.* Joint Appendix ("J.A.") 115. He also filed additional evidence in support of his petitions to revoke. *Id.* at 126-38, 167-68. Petitioner subsequently sought a stay of the "operation of the 'Notice of Exemption' " pending judicial review. *Id.* at 184. The ICC denied that stay, emphasizing that the *January 7 Decision* was "not ripe for review because the Commission at this time has neither ruled on the pending revocation and reopening requests nor considered WB's response to the labor unions' arguments," and that, in any event, petitioner had not shown that consummation of the trackage rights agreement would cause irreparable harm to employees. Pet. App. at 31a-32a. The petitions for reopening and revocation are pending before the ICC.[5]

On February 17, 1988, petitioner sought review of the *January 7 Decision* before the Eighth Circuit. In his

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[5] The case continues to be in active litigation before the Commission. On August 4, 1988, RLEA moved to supplement the ICC record with additional argument and evidence, including the decision below. On August 19, BN and WB responded, reasserting their rights to submit additional evidence on petitioner's claims in the event the Commission does not reject them. Petitioner has sought to strike that response and RLEA has sought to challenge the submission of any additional evidence by WB and BN.

Although ICC regulations permitted WB to exercise the trackage rights notwithstanding these ongoing agency proceedings, the transaction has not yet been consummated. Shortly after the Eighth Circuit dismissed the petition for review, the District Court for the Northern District of Illinois enjoined the transaction on Railway Labor Act grounds. *Burlington Northern Railroad v. United Transportation Union,* No. 88-C-2667 (N.D. Ill. June 6, 1988), *appeal docketed,* No. 2180 (7th Cir. June 10, 1988).

briefs, petitioner presented to that court the very issues still pending before the Commission. The Eighth Circuit, however, dismissed the petition for review on two independent grounds.

First, relying on this Court's decision in *ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360 (1987) (*"BLE"*), the lower court held that, in light of the petitions to reopen and revoke, the *January 7 Decision* was not final and hence not subject to judicial review. Pet. App. at 10a-12a. The court of appeals was "convinced that under the circumstances of this case *Brotherhood of Locomotive Engineers* stands for the proposition that once [petitioner] filed petitions to reopen and to revoke the exemption, the *January 7 Decision* became nonfinal." *Id.* at 12a.

Second, the Eighth Circuit held that the ICC's refusal to reject the exemption notice was an action of a preliminary nature not subject to judicial review. *Id.* at 12a-14a. Relying on *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980), the court held that judicial review would be available after—but not until—the ICC has made a final determination, based on a fully developed record, regarding the challenges to the WB exemption. Pet. App. at 13a-14a.[6]

REASONS FOR DENYING THE WRIT

This case involves the routine application of settled principles as to the finality of administrative orders and their susceptibility to review in the courts of appeals. The Eighth Circuit's application of those principles presents neither a conflict among circuits nor an issue of national importance. This case accordingly does not warrant a grant of certiorari.

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[6] One member of the Eighth Circuit panel dissented from these jurisdictional holdings. He issued a brief opinion reaching the merits of the carrier status question now pending before the ICC. *See* Pet. App. at 17a-18a.

The Eighth Circuit correctly followed this Court's ruling in *BLE* on the finality of administrative decisions. Its decision is also consonant with the holdings of other courts of appeals that jurisdiction does not lie to review administrative decisions until motions for reconsideration have been resolved by the agency and that, in any event, preliminary agency decisions to accept regulatory filings are not reviewable.

Finally, the lower court's decision presents no valid concern regarding the allocation of authority between administrative agencies and the courts. The result produced by the decision below avoids undue judicial interference with ongoing administrative proceedings without depriving any party of the right to present its claims. It properly allows full development of the record and permits the agency to apply its expertise prior to judicial review.

I. THE EIGHTH CIRCUIT CORRECTLY DISMISSED THE PETITION FOR REVIEW UNDER *BLE*

The gravamen of petitioner's request for certiorari is that the Eighth Circuit's ruling is somehow inconsistent with this Court's decision in *BLE*. *See* Pet. at 9-12. But petitioner claims no actual conflict with the holding in *BLE*, suggesting only that the decision below is at odds with the "logical inferences" he draws from the case. *See id.* at 9. Those inferences, however, are not borne out by the Court's opinion. *BLE* squarely held that a petition for reopening or reconsideration of an agency decision renders that decision nonfinal for purposes of judicial review.

Petitioner bases his claim that the ICC's decision is a final order on language in 49 U.S.C. § 10327(i), which provides that "an action of the Commission . . . is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date." The effect of that provision on the

availability of judicial review was also at issue in *BLE*. The Court there held that section 10327(i)

> has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . *but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal.*

107 S. Ct. at 2369 (emphasis modified; citations omitted). In so holding, the Court confirmed its prior determinations that an administrative order is not final for purposes of judicial review until outstanding petitions for agency reconsideration have been resolved.[7]

The Eighth Circuit applied that settled rule in this case. It noted that *BLE* "cited with approval various cases holding that petitions that are actually filed render the orders under consideration nonfinal." Pet. App. at 11a (citing *Black Ball*, 397 U.S. at 541; *Delta Airlines*, 367 U.S. at 326; and *Outland*, 284 F.2d at 227-28). The Eighth Circuit acknowledged the possibility that in some circumstances—such as multi-party proceedings—an agency decision might "be final for one purpose yet nonfinal for another purpose." Pet. App. at 12a. It nonethe-

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[7] *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970) ("where a motion for rehearing is in fact filed there is no final action until the rehearing is denied"); *see also CAB v. Delta Air Lines*, 367 U.S. 316, 326 (1961).

Petitioner argues that *Delta Air Lines* does not stand for the rule that a pending petition for reconsideration precludes judicial review. *See* Pet. at 11-12. However, the Court there specifically relied on the "general notion," developed by the courts of appeals, "that an administrative order is not 'final,' for the purposes of judicial review, until outstanding petitions for reconsideration have been disposed of." 367 U.S. at 326 (emphasis deleted) (citing *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960), and *Braniff Airways, Inc. v. CAB*, 147 F.2d 152 (D.C. Cir. 1945)). Moreover, since *Delta Air Lines* the courts of appeals have repeatedly held they lack jurisdiction when a petition for reconsideration is pending before the agency. *See* note 9 *infra*.

less denied petitioner's request for review because "no cases hold that *the same party* may *simultaneously* seek both judicial and administrative review." *Id.* (emphasis added).[8] Nothing in *BLE* even suggests a contrary rule. Moreover, every circuit that has addressed the issue has concluded that a petition for reconsideration renders the action to be reconsidered nonfinal for purposes of judicial review.[9]

Petitioner contends that *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985), supports a contrary result. *See* Pet. at 9. However, *Eagle-Picher* dealt with a wholly different issue—whether a petition for judicial review filed outside the statutory period could be deemed timely. 759 F.2d at 912. Rejecting an argument that the sixty-day time limit should not be enforced because the petitioner believed its claims had not ripened within that period, the court of appeals observed that "petitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 909. No issue concerning the effect of a petition for reconsideration was involved.[10]

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[8] For this reason, petitioner's reliance on *Black Ball* is misplaced. *See* Pet. at 12. In *Black Ball* one party to an administrative proceeding sought agency reconsideration while another sought judicial review. 397 U.S. at 536. Here, as the court below observed, petitioner has sought both simultaneously.

[9] *See, e.g., Aeromar, C. Por. A. v. Department of Transportation*, 767 F.2d 1491, 1493-94 (11th Cir. 1985); *Selco Supply Co. v. EPA*, 632 F.2d 863, 866 (10th Cir. 1980) (Seymour, J., concurring), *cert. denied*, 450 U.S. 1030 (1981); *ECEE, Inc. v. FERC*, 611 F.2d 554, 557 (5th Cir. 1980); *Pennsylvania v. ICC*, 590 F.2d 1187, 1193 (D.C. Cir. 1978); *New York v. United States*, 568 F.2d 887, 893 (2d Cir. 1977); *Tiger International, Inc. v. CAB*, 554 F.2d 926, 931 n.10 (9th Cir.), *cert. denied*, 434 U.S. 975 (1977).

[10] Petitioner also relies on the docketing form used by the District of Columbia Circuit and on 49 C.F.R. § 1115.6 as evidence that judicial review and agency reconsideration may occur at the same time. *See* Pet. at 10, 12. Those contentions simply illustrate the paucity of support for petitioner's claims. The express policy of the

Far from creating a "chaotic situation," *see* Pet. at 9, the Eighth Circuit's holding that there is no review jurisdiction prior to the completion of agency proceedings guarantees the most efficient use of both judicial and administrative resources. Because agency reconsideration may render judicial review unnecessary, judicial resources will not be wasted. Litigants' resources also will be conserved because parties will not be called upon unnecessarily to file or respond to petitions for review. When it takes place, moreover, judicial review will be premised upon a complete record that the agency has had a full opportunity to develop and evaluate. *See Asarco, Inc. v. FERC*, 777 F.2d 764, 772 (D.C. Cir. 1985). The decision below thus promotes the sound administration of justice, and there is no occasion for further review by this Court.

II. THERE IS NO CONFLICT BETWEEN THE EIGHTH CIRCUIT'S DISMISSAL OF THE PETITION FOR REVIEW AND THE HOLDINGS OF THIS COURT OR OTHER COURTS OF APPEALS

The Eighth Circuit's alternative holding—that even apart from the pendency of reopening requests the refusal to reject the WB exemption notice was by its nature non-reviewable—similarly does not merit the attention of this Court.[11] As the lower court recognized, an agency's

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D.C. Circuit is that petitions for reconsideration render agency action nonfinal. *See, e.g., Outland*, 284 F.2d at 227. Its docketing form merely provides a means to ensure that it has jurisdiction (*i.e.*, that a motion for reconsideration has not been filed before the agency in the same action that has been brought before the court). Likewise, the regulation under which the ICC notifies the courts of appeals of pending petitions for reopening serves to prevent inadvertent federal court intervention in ongoing agency proceedings.

[11] Petitioner mischaracterizes the lower court's alternative holding as merely involving an examination of exceptions to the finality rule. *See* Pet. at 13. In fact, the lower court's holding in this regard constitutes an independent ground supporting its dismissal of the petition for review. *See* Pet. App. at 12a-15a.

refusal to reject a filing is generally not subject to judicial review. Pet. App. at 13a. The Eighth Circuit relied upon *Papago Tribal Utility Authority v. FERC*, 628 F.2d at 235, in which the District of Columbia Circuit properly concluded that the mere acceptance of a filing "is the *initiation* of an administrative proceeding; judicial review properly follows the *conclusion*" of that proceeding, at which protestants can raise "the same issues now posed for summary disposition." *Papago*, 628 F.2d at 240.

The *Papago* doctrine is based on *Arrow Transportation Co. v. Southern Railway*, 372 U.S. 658 (1963), and *Southern Railway v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). *See* 628 F.2d at 242. There thus can be no question that it conforms with the decisions of this Court. Moreover, all courts of appeals that have had occasion to address the question have adhered to the *Papago* doctrine.[12]

Petitioner's suggestions that *Papago* is somehow limited to "utility rate filings," Pet. at 4, or to tariff filings, *id.* at 13, are plainly without substance. The courts of appeals have consistently applied the same rule to actions under the Interstate Commerce Act.[13] They have done so, moreover, in cases involving applications for operating authority, which are similar to the trackage rights authority here at issue.[14]

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[12] *See, e.g., Maine Public Advocate v. FCC*, 828 F.2d 68 (1st Cir. 1987); *Public Utilities Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 628-30 (9th Cir. 1985); *Newark v. FERC*, 763 F.2d 533, 540-45 (3d Cir. 1985); *American Broadcasting Co. v. FCC*, 682 F.2d 25, 30-32 (2d Cir. 1982); *Aberdeen & Rockfish Railroad v. United States*, 664 F.2d 41 (5th Cir. 1981); *Mayne v. United States*, 13 Cl. Ct. 60, 63-65 (1987).

[13] *See Earth Resources Co. v. FERC*, 628 F.2d 234 (D.C. Cir. 1980); *see also Illinois Commerce Commission v. ICC*, 789 F.2d 951, 954 (D.C. Cir. 1986).

[14] *See Barnes Freight Line, Inc. v. ICC*, 569 F.2d 912 (5th Cir. 1978); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112 (8th Cir. 1977).

As the Eighth Circuit noted, *Papago* and the holdings of this Court upon which it is based do not depend on the specific statutory language or procedure involved, but rather reflect the practical difficulties of reviewing interlocutory actions without the benefit of a complete record and full agency consideration. Pet. App. at 13a; *see Papago*, 628 F.2d at 238-39. The court of appeals did, however, observe that application of *Papago* in this context would be consistent with "the statutory scheme of the Staggers Act, which provides for challenges to the Commission's actions through revocation proceedings after the transaction has been consummated." Pet. App. at 14a. The lower court also emphasized that this approach will not cause employees irreparable harm because they have the benefit of extensive labor protective conditions. *Id.* at 15a.

Petitioner's final contention—that *Papago* is inapplicable because it involved a factual question whereas this case involves jurisdiction, *see* Pet. at 14—will not withstand analysis. As the Eighth Circuit pointed out, the jurisdictional issue here turns on technical factual issues that fall within the agency's expertise and should be determined by it in the first instance. *See* Pet. App. at 14a-15a; *see also FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Burlington Northern, Inc. v. Chicago & North Western Transportation Co.*, 649 F.2d 556, 558-59 (8th Cir. 1981); *Marine Wonderland & Animal Park, Ltd. v. Kreps*, 610 F.2d 947, 950 (D.C. Cir. 1979). That conclusion reflects both the ICC's reliance on factual questions in addressing the carrier status issue and the state of the agency record at the time of the *January 7 Decision*. *See* Pet. App. at 24a.[15] The court below thus correctly held that this does not

[15] Even one of the Commissioners who dissented from the *January 7 Decision* agreed that further development of the record would be required before WB could be held to lack carrier status. Pet. App. at 25a-29a.

fall within that narrow category of cases in which refusal to reject turns on purely legal issues. *Id.* at 14a.

The Eighth Circuit's reliance on *Papago* does not merit this Court's review. It reflects a settled and sensible allocation of judicial resources, based on a close analysis of the statutory scheme and a reasoned determination that denying premature review would not harm petitioner or the employees whose interests he represents. *See id.* at 14a-15a. On this ground as well as in its reliance on *BLE*, the court below simply applied established law, and petitioner has failed to demonstrate any basis for review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 7, 1988

APPENDIX A

LISTING PURSUANT TO RULE 28.1

The following list of parent company, subsidiaries (except wholly owned subsidiaries) and affiliates is submitted by petitioners Burlington Northern Railroad Company and Winona Bridge Railway Company pursuant to Rule 28.1 of the Rules of this Court:

1. Winona Bridge Railway Company is a wholly owned subsidiary of Burlington Northern Railroad Company.

2. Burlington Northern Railroad Company is a wholly owned subsidiary of Burlington Northern Inc.

3. The subsidiaries (other than wholly owned subsidiaries) and affiliates of Burlington Northern Inc. and Burlington Northern Railroad Company are:

Burlington Northern Inc.:

Burlington Northern Motor Carriers Inc.

Burlington Resources Inc.

New Mexico and Arizona Land Company
NZ Development Corporation
NZ Properties, Inc.

Plum Creek Timber Company, Inc.
Glacier Park Company
Burlington Environmental Inc.
Chemical Processors, Inc.

The El Paso Company
Meridian Oil Holding Inc.
Meridian Oil Inc.
Butte Pipe Line Company
Portal Pipe Line Company
Portal II Company

CBR Distribution Corporation

National Exchange, Inc.
National Exchange Satellite, Inc.

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago

Camas Prairie Railroad Company

Davenport, Rock Island and North Western Railway Company

The Denver Union Terminal Railway Company

Houston Belt & Terminal Railway Company

Iowa Transfer Railway Company

Kansas City Terminal Railway Company

Keokuk Union Depot Company

Longview Switching Company

M T Properties, Inc.

Paducah & Illinois Railroad Company

Portland Terminal Railroad Company

Terminal Railroad Association of St. Louis

Trailer Train Company

The Wichita Union Terminal Railway Company